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Supreme Court of the United States

October Term, 1963

No. 857.

ROBERT F. TROST,

Petitioner,

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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The questions involved herein are (1) whether a Court of Appeals may subvert the purpose of the "clearly erroneous rule" by expediently affirming the findings of the trial Court, yet drawing conclusions as to negligence and contributory negligence dependent upon findings directly contrary to those of the trial Court, and (2) whether a Court of Appeals can destroy a suit predicated upon the negligence of a ship's Master by holding that his act was outside the scope of his employment, although directly opposed to the findings of the trial Court, thus eliminating the wrongdoer as a fellow-servant and creating an artificial distinction between land and ship accidents by imposing upon the seaman the burden of his own safety from unknown dangers while ashore in the course of his employment.

The basic ruling of the majority of the Appellate Court was predicated upon the trap door opening being obvious to the petitioner.[1]

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[1] The cases cited in the opinion of that Court turned upon the prior knowledge of the condition by the injured seaman with concomitant lack of control and actual notice to the shipowner.

The trial Court herein found the Master to have notice of the condition with absence of knowledge to the petitioner, that the danger was not open and notorious. There can be no doubt but that the Court of Appeals erroneously took upon itself the right to rewrite the findings of the trial Court. Its language described the petitioner's footsteps as "errant" and the Master as not having to act as a "nautical seeing eye dog." The entire thrust of the trial Court's ruling was obliterated by the Appellate Court's realization that it could not overrule the findings (since they were so obviously substantiated by the evidence) leading to the incredible affirmance of the trial Court's findings coupled with conclusions predicated upon findings totally opposite to those of the lower Court.

The cases cited by the respondent are readily distinguishable from the case at bar. *Farrell* v. *United States*, 167 F. 2d. 781 (2c), involving a crewman returning from shore leave through the wrong gate, going into a compound area entirely separated from the vessel, and injured, held that the condition was open and obvious, that there was no danger in the proper compound area, that it was not foreseeable that the seaman would enter the wrong gate to return to the vessel.

Paul v. *United States*, 205 F. 2d 38 (3C) involved a return from shore leave in an area not under the shipowner's control. Held that there was no notice to the shipowner, thus no duty to inspect and warn. The Court stated that there was no duty to inspect premises of another where there was neither control of premises nor notice of the unsafe condition. Noteworthy was the dissent of Judge Biggs, affirming the duty to warn upon notice of the condition.

Wheeler v. *West*, 205 F. 2d 354 (2C), affirmed on the lower Court's opinion, 103 F. Supp. 631, was a shore leave case involving an accident when returning to the ship via a

viaduct. The trial Court had found that the shipowner had no control of the viaduct and no actual knowledge of the absence of lights or that a locomotive was being operated on the viaduct itself. Holding the viaduct's condition to be open and obvious to the seaman and to the Master, the Court pointed out that the locomotive was in use at 2:00 a.m., that an inspection at an earlier time would not have disclosed the locomotive's movement and would not have aided the plaintiff.

Again, the Court indicated the importance of notice of a shoreside condition to the Master in citing *McAllister* v. *Cosmopolitan*, 169 F. 2d 4, rev'd other grounds, 337 U. S. 783.

Robinson v. *Northeastern*, 228 F. 2d 479 (2C), involving a seaman returning from shore leave killed by a locomotive in the compound area neither owned nor controlled by the shipowner, held that there was no duty to warn of the danger.[2]

The cases are all consistent with the petitioner's position. This case involves the duty to safeguard from a dangerous condition, known to the shipowner through its Master, and unknown to the petitioner. The decision by the Court below created the setting for destruction of that duty in substituting the primary responsibility of a shipowner to safeguard its seamen for a test consisting primarily of measuring the distance between the accident site and the ship.

The dissent by Circuit Judge Clark that the Master was guilty of "rather gross negligence" in view of his

[2] The writer was the plaintiff's attorney in the *Robinson* case. The issue of failure to warn was expressly abandoned since there was a lack of any evidence to show notice of the presence of locomotives to the shipowner. This is a conformity with the rule asserted by the petitioner herein—that only where there is both lack of control (giving rise to possible constructive notice) and no actual notice of the condition—no duty to warn would arise.

knowledge of the open trap door coupled with the lack of such knowledge by the petitioner was fully consistent with the findings of the trial Court and on settled principles of law should have been the ruling of the Court below. That it wasn't is inexplicable and has paved the way for Appellate Courts to destroy the force of trial Court findings by appeal *de novo*, in contradiction to this Court's "clearly erroneous" doctrine in *McAllister* v. *United States*, 348 U. S. 19. It has set the stage for enormous inroads in the shipowner's duty to protect its seamen while ashore in the course of their employment in furtherance of ship's business and has again created improper distinctions between land and ship accidents, seemingly so thoroughly obliterated in the *O'Donnell*, *Senko* and *Braen* cases. The burden of safety in the presence of unknown danger has now been cast upon the worker in contradiction to every humanitarian principle underlying the enactment of the Jones Act, remedial legislation, as uniformly interpreted by the judiciary for the past forty odd years and is a return to a bygone era of rampant injustice in the working conditions afforded seamen by shipowners.

It would seem to require consideration and reversal by this Court in order to once again establish uniformity of decision.

As to the question of derivative liability, if the Master was indeed within the course of his employment when he negligently permitted the petitioner to fall, the shipowner's liability under the doctrine of respondeat superior would follow. The decision of the Court below was that the Master was, in some manner, only a volunteer, that he somehow left the shipowner's employ. When and how the sudden change was effected was not answered in spite of the rather obvious continuation of the shipowner's duty to provide the petitioner with a safe place to work. If that concept of duty had any validity it could not be negated by the arbitrary statement of a litigant shipowner as to

whether the employee was authorized to be in the ship's service at the moment of the accident.

The trial Court found derivative liability to the shipowner as a result of the Master's negligent act, committed during the period when the shipowner's primary duty to provide a safe place to work was existent and when petitioner and the Master were completing their duties on behalf of the owner.

The *Robinson* case, 228 F. 2d 679, *supra*, questioned whether a seaman on shore leave, returning to his vessel and volunteering to aid a drunken shipmate could, by his negligence, hold the shipowner liable when the activity was never within the customary duty of men on shore leave, thus never authorized by the shipowner.

Thurman v. Alcoa, 229 F. 2d, 73, rejected the thought that the shipowner had the duty to seaman on shore leave to provide safe transportation while ashore, again, lacking control and notice.

In neither case did the facts ever give rise to a duty from the shipowner to the seaman to care for the latter's safety. In the case at bar the shipowner's duty to provide a safe place to work was limited only by both lack of control and actual notice of danger, and knowledge of the opening was painfully apparent to the Master.

A concept of derivative liability dependent only upon evidence of specific authorization of the particular act is, in fact, an oblique approach to the defense of fellow-servant negligence. In the usual common law suit the doctrine of respondeat superior is not applicable to accidents arising out of negligence by a co-worker. In the instant matter, liability was negated by lifting the wrongdoer out of the employment status, thus leaving the shipowner free of actual notice. It astonishingly eliminated the fellow-servant rather than the fellow-servant rule. As such the decision of the Court below should be reversed

as an incorrect guideline leading to the negation of the shipowner's long settled duty of due care to provide a safe place to work.

The artificial barrier of specific authorization erected by the Court below placed the injured seaman at the none too tender mercies of the shipowner and should not be permitted to create an incorrect standard of conduct in future shore-side accidents as distinguished from those occurring aboard ship. As was said by Circuit Judge Clark in dissent, "Since they were on ship's business and since there is no question of contributory negligence, the moderate award made the plaintiff should stand."

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: March 24, 1964.

Respectfully submitted,

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